

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JERRY BROWN,  
Petitioner,  
v.

RENEE BAKER, *et al.*,  
Respondents.

Case No. 3:19-cv-00258-LRH-WGC

**ORDER DENYING  
MOTION TO DISMISS  
(ECF NO. 39)**

In this habeas corpus action, the respondents filed a motion to dismiss (ECF No. 39) on June 24, 2020. The Court will deny that motion, without prejudice to the respondents asserting in their answer that the petitioner's claims are procedurally defaulted.

On November 2, 2016, the petitioner, Jerry Brown, was convicted, upon guilty pleas, in Nevada's Tenth Judicial District Court (Churchill County), of two counts of lewdness with a child under age 14. See Judgment of Conviction, Exh. 10 (ECF No. 40-10). Brown was sentenced to two consecutive sentences of life in prison, with the possibility of parole after ten years on each. See *id.* Brown did not appeal from the judgment of conviction.

Brown filed a post-conviction petition for writ of habeas corpus in the state district court on October 5, 2017. See Petition for Writ of Habeas Corpus, Exh. 16 (ECF No. 40-16). While that petition was pending, he filed another such petition. See Petition for Writ of Habeas Corpus, Exh. 30 (ECF No. 40-30). The state district court consolidated the two petitions and denied Brown relief in a written order filed on November 3, 2017. See Order Dismissing Petition for Writ of Habeas Corpus, Exh. 26 (ECF No. 40-26). Brown

1 appealed, and the Nevada Court of Appeals affirmed on February 12, 2019. See Order  
2 of Affirmance, Exh. 59 (ECF No. 41-28). The Court of Appeals denied rehearing on  
3 April 24, 2019. See Order Denying Rehearing, Exh. 61 (ECF No. 41-30).

4 This Court received Brown's *pro se* federal petition for writ of habeas corpus, for  
5 filing, on May 15, 2019 (ECF No. 4). The Court granted Brown's motion for appointment  
6 of counsel, and appointed counsel for Brown. See Order entered May 16, 2019 (ECF  
7 No. 3). With counsel, Brown filed a first amended habeas petition on July 11, 2019 (ECF  
8 No. 13), and a second amended habeas petition on March 25, 2020 (ECF No. 24).

9 Respondents filed their motion to dismiss (ECF No. 39) on June 24, 2020,  
10 asserting that all the claims in Brown's second amended petition are unexhausted in  
11 state court. Brown filed an opposition to the motion to dismiss on August 27, 2020 (ECF  
12 No. 44), conceding that his claims have not been presented in state court, but arguing  
13 that they are technically exhausted because, under state procedural rules—the state  
14 statute of limitations (NRS 34.726) and the state statute placing limits on successive  
15 petitions (NRS 34.810)—they are now procedurally barred in state court, and, therefore,  
16 the state courts would not now adjudicate their merits. Brown recognizes that, as a  
17 result, his claims are potentially subject to denial as procedurally defaulted, but he  
18 argues that he can overcome the procedural default under *Martinez v. Ryan*, 566 U.S. 1  
19 (2012). Respondents filed a reply on September 25, 2020 (ECF No. 45), requesting that  
20 the *Martinez* analysis be deferred and considered in conjunction with the merits of  
21 Brown's claims.

22 A federal court may not grant habeas corpus relief on a claim not exhausted in  
23 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of  
24 federal-state comity, and is intended to allow state courts the initial opportunity to  
25 correct constitutional violations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To  
26 exhaust a claim, a petitioner must fairly present the claim to the highest available state  
27 court and must give that court the opportunity to address and resolve it. See *Duncan v.*  
28 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,

1 10 (1992). A claim is fairly presented to the state court if, before that court, the petitioner  
2 describes the operative facts and legal theory upon which the claim is based. See  
3 *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275;  
4 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982). The parties agree—and the  
5 record reflects—that Brown has not presented the state courts with the claims he  
6 asserts here.

7 It appears, further, that Brown’s claims would now be procedurally barred in state  
8 court. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that a  
9 state prisoner who fails to comply with the state’s procedural requirements in presenting  
10 claims is barred by the adequate and independent state ground doctrine from obtaining  
11 a writ of habeas corpus in federal court. *Coleman*, 501 U.S. at 731–32 (“Just as in those  
12 cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who  
13 has failed to meet the State’s procedural requirements for presenting his federal claims  
14 has deprived the state courts of an opportunity to address those claims in the first  
15 instance.”). Brown’s claims, now procedurally barred in state court, are subject to  
16 application of the procedural default doctrine in this case. See *Dickens v. Ryan*, 740  
17 F.3d 1302, 1317 (9th Cir. 2014) (“An unexhausted claim will be procedurally defaulted, if  
18 state procedural rules would now bar the petitioner from bringing the claim in state  
19 court.”). Where a state-court procedural bar constitutes an adequate and independent  
20 state ground for denial of habeas corpus, the default may be excused only if “a  
21 constitutional violation has probably resulted in the conviction of one who is actually  
22 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting  
23 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To demonstrate cause for a  
24 procedural default, the petitioner must “show that some objective factor external to the  
25 defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S.  
26 at 488. For cause to exist, the external impediment must have prevented the petitioner  
27 from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect  
28 to the question of prejudice, the petitioner bears “the burden of showing not merely that

1 the errors [complained of] constituted a possibility of prejudice, but that they worked to  
2 his actual and substantial disadvantage, infecting his entire [proceeding] with errors of  
3 constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing  
4 *United States v. Frady*, 456 U.S. 152, 170 (1982). In *Martinez*, the Supreme Court ruled  
5 that ineffective assistance of post-conviction counsel may serve as cause to overcome  
6 the procedural default of a claim of ineffective assistance of trial counsel. See *Martinez*,  
7 566 U.S. at 9.

8 Because it is possible that Brown may be able to overcome the procedural  
9 default of his claims, under *Martinez*, by a showing of ineffective assistance of counsel  
10 in his state habeas action, and because this issue is intertwined with the merits of his  
11 claims, the Court determines that this issue will be best addressed after Respondents  
12 file an answer, and Brown files a reply. The Court will, therefore, deny the motion to  
13 dismiss, without prejudice to Respondents asserting their procedural default defense in  
14 their answer, along with their briefing of the merits of Brown’s claims.

15 **IT IS THEREFORE ORDERED** that Respondents’ Motion to Dismiss (ECF No.  
16 39) is **DENIED**.

17 **IT IS FURTHER ORDERED** that Respondents will have **90 days** from the date of  
18 this order to file an answer. In all other respects the schedule for further proceedings set  
19 forth in the order entered June 14, 2019 (ECF No. 12) will remain in effect.

20  
21 DATED this 3rd day of December, 2020.

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23   
24 LARRY R. HICKS  
25 UNITED STATES DISTRICT JUDGE  
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